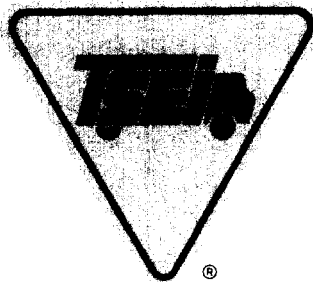


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DEPT. OF TRANSPORTATION
DOCKETS

2003 OCT 30 P 12:54

October 29, 2003

National Highway Traffic Safety Administration
Docket Management Facility
Room PL-401
400 Seventh Street, SW
Washington, DC 20590-001

Re: Docket No. NHTSA 03-15651; FMVSS 108, Lamps, Reflective Devices and
Associated Equipment; Draft Interpretations

Dear Sir or Madam:

NHTSA-03-15651-24

I am submitting these comments on the above-referenced matters on behalf of the
Transportation Safety Equipment Institute (TSEI), which I serve as Executive Director.

TSEI, with its offices at 1225 New York Ave., NW, Washington, DC, is a non-
profit trade association representing North American manufacturers of vehicle safety
equipment, including headlighting and signal lighting products, reflex reflectors,
retroreflective conspicuity tape, emergency warning triangles, emergency lighting,
rearview mirrors, supplemental information devices, and other safety equipment for
truck, trailer, passenger, emergency service and related vehicles.

Summary of Comment

Nothing in Federal Motor Vehicle Safety Standard (FMVSS) 108 or its regulatory
history requires replacement lighting equipment which is compliant with the standard to
(a) be placed in the same location on the vehicle as the original equipment, or (b) employ
the same light source, wiring, lens or bulb as the original equipment.

TSEI appreciates the National Highway Traffic Safety Administration's (NHTSA) attempt to reconcile differing views, including apparently those within the agency, on these important issues through a public comment process on draft interpretation letters. However, the "important novel issues and potentially broad impacts" identified by NHTSA in its July 17, 2003 request for comments, if they are to be pursued and resolved, require agency rulemaking with the opportunity to comment on these proposed, very substantive changes in FMVSS 108 construction and application.

If the tentative views expressed in the draft interpretations were given effect, the agency's indicated construction of FMVSS 108, which is totally devoid of any articulation of safety need or benefit, would impose a design-stifling regime on lighting manufacturers, in effect appointing vehicle manufacturers as the arbiters of lighting design and the means of lighting performance to comply with the standard. As well, replacement lighting manufacturers might in some situations be placed at risk of infringing vehicle or original lighting equipment manufacturers' intellectual property rights.

TSEI strongly opposes the use of the interpretation process to resolve the important issues involved, and urges reconsideration by the agency of its tentative position in the matters identified above.

TSEI takes issue with the agency tentative views expressed in both draft interpretations and submits that NHTSA's objectives should be addressed through rulemaking. TSEI's comment includes proposed revisions in NHTSA's draft interpretations, consistent with the Institute's views as expressed herein, and suggestions for possible rulemaking to address the agency's concerns and objectives without applying the broad brush of illegality both to compliant and non-compliant replacement lighting.

1. The Draft Interpretations Lack a Regulatory Basis

A final rule for FMVSS 108 regulation of replacement lighting was first adopted in 1970, with an effective date of January 1, 1972.¹ Then, and in the more than 30 years

¹ 35 *Fed. Reg.* 16840 (1970).

since, nothing in FMVSS 108, its amendments or preambular regulatory history provides support for a substantial portion of the positions suggested in the draft interpretations. Apparently recognizing this, in the admitted context of “important novel issues and potentially broad impacts,”² NHTSA’s citation of supporting authorities is strained and circular.

The agency first points to subparagraph S5.8.1 of the standard, which provides that, “each lamp ... manufactured to replace any lamp ... on any vehicle to which this standard applies, shall be designed to conform to this standard.” Even though a number of lighting manufacturers have advised NHTSA in this comment process and at earlier times that their respective products will ensure continued vehicle compliance with FMVSS 108 when the replacement lighting is installed, thereby meeting the requirements of S5.8.1, the agency would here attempt to amend S5.8.1 by interpretation, to provide that “the specific requirements of Standard No. 108 that apply to an item of replacement equipment are determined by reference to the original equipment being replaced and the vehicle for which it was designed.”³ The authority for this latter day engraftment on Standard 108 is said to be two earlier letters of interpretation, issued in February 2002 and April 2003, respectively. These important, substantive changes proposed by the agency in FMVSS 108 construction require, however, a full, open airing under the rulemaking process rather than a boot-strapped, “interpretation as authority” approach.

Returning to subparagraph S5.8.1, TSEI respectfully submits that a lighting manufacturer whose replacement lamp complies with Standard 108, such that a vehicle with this replacement lamp continues to comply with the standard, meets the stated requirements of S5.8.1. Nothing in the standard takes this requirement to the extremes proposed by NHTSA, hamstringing lighting producers to be blindly obedient to original equipment strictures in terms of locations and light sources, wiring, lenses and bulbs “in the same manner as the original equipment....”⁴

² 68 *Fed. Reg.* 42454 (2003).

³ *Id.* at 42455.

⁴ *See id.*

Indeed, other provisions of Standard 108 provide express support for lighting manufacturers to comply with subsequent changes in requirements (updated SAE standard references) in lieu of earlier requirements, with no qualification as to whether this comports with original equipment identity of compliance.⁵

With reference to Standard 108's "all functions" requirement outlined in the draft interpretations, TSEI notes that the agency some years ago rejected a lighting industry petition which would have required replacement lighting equipment to be marked with a code identifying the functions included in the product.⁶

2. NHTSA's Proposals Require Rulemaking

TSEI agrees with NHTSA that the issues raised in the draft interpretations involve "important novel issues and potentially broad impacts...." The interpretations proposed by the agency will unquestionably have a significant, negative impact on the vehicle lighting industry which has for more than 30 years been producing aftermarket lighting equipment compliant with FMVSS 108 on the vehicle as to which it has application. Without changing a word of the standard, and effectively on a retroactive basis, NHTSA would encapsulate these manufacturers in a cocoon of original equipment design, with the attendant performance and technology restrictions.

The agency is to be commended for publicly airing its tentative views in these matters, and TSEI appreciates the dilemma confronting the agency on these issues. However, NHTSA's proposed actions here would constitute substantive, radical departures from FMVSS 108's requirements as understood by all parties for more than three decades, and the agency's compliance and enforcement positions related to the Standard 108 provisions for aftermarket lighting compliance. If NHTSA desires to pursue its proposals, this can only be done by rulemaking to revise FMVSS 108. Indeed, the situation here is much more compelling than that involved in *Wagner Electric Corporation v. Volpe*, which required the agency to engage in rulemaking to amend

⁵ See, §§S5.8.3(b), S5.8.4(b) and S5.8.8.

⁶ 52 Fed. Reg. 17791 (1987).

FMVSS 108.⁷ TSEI's proposed approach to address these issues through rulemaking to amend FMVSS 108 is outlined in Part 5 of these comments.

3. The Draft Interpretations Are at Odds with NHTSA's Efforts to Make Standard 108 Less Design Restrictive

In formulating the National Traffic and Motor Vehicle Safety Act of 1966, Congress expressed a clear intent that FMVSS be expressed in terms of performance rather than design.

“Unlike the General Services Administration's procurement standards, which are primarily design specifications, both the interim standards and the new and revised standards are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance....”⁸

This general statement by Congress as to the performance orientation which safety standards were to take was elaborated on further by the Senate Commerce Committee Report and subsequent Conference Report issued on the traffic safety bill (S. 3005):

“The committee is not empowering the Secretary to take over the design and manufacturing functions of private industry.”⁹

“The Secretary is not to become directly involved in questions of design.”¹⁰

In its 1967 Report to the Congress concerning the development of the initial federal motor vehicle safety standards, the National Highway Safety Bureau observed, in this connection, that:

“There are no precise legal or other criteria for deciding when a performance standard begins to have design overtones....

The purpose of specifying performance rather than design in the standards is to favor technological progress. The Congress considered this

⁷ 466 F.2d 1013 (3rd Cir. 1972).

⁸ S. Rep. No. 1301, 89th Cong., 2d Sess., 6 (1966).

⁹ *Id.* at 4.

¹⁰ H.R. Rep. No. 1919, 89th Cong., 2d Sess., 15 (1966).

issue and concluded that the standards should favor such progress rather than retard it by ‘freezing’ the present state of the art.”¹¹

Even though FMVSS 108 was written with design overtones, including the “designed to conform” language to accommodate “occasional” deviations from compliance “in mass production of [lighting] items, all of which cannot be subjected to individual testing”¹² NHTSA has over the years tried to reduce the design-related requirements of the standard and encouraged “technological progress” in lighting product design and performance.¹³

In its draft interpretations, by requiring replacement lighting adherence to original equipment lighting design, NHTSA proposals are at odds (a) with its policy to encourage technological advancement, (b) with its efforts to reorient Standard 108 toward more performance-related requirements, (c) with the public interest in offering the consumer more options, and (d) with the congressional direction “not ... to take over the design and manufacturing functions of private industry.” By way of only one example, a sweeping prohibition of the replacement of an incandescent light with an LED light in all vehicle applications would sacrifice the benefits of this new technology in terms of improved conspicuity, extended life and reduced amperage draw on wiring systems.

Tying replacement lamps to original equipment designs would convert FMVSS 108 into a moving and ever-changing compliance target controlled by vehicle manufacturers, whose design choices oftentimes have at least as much to do with styling and commercial considerations as with safety. This obscures and defeats the overriding objective of Standard 108, which is that compliance is measured in terms of lighting performance in conformity with the standard, not to be artificially qualified by original equipment styling and other product design considerations.

¹¹ Report of the National Highway Safety Bureau on the Development of the Initial Vehicle Safety Standards, 6-7 (1967).

¹² See 37 *Fed. Reg.* at 22802 (1972).

¹³ For some of the older examples of these efforts, see 50 *Fed. Reg.* 37882 (1985) and 50 *Fed. Reg.* 42735 (1985). More recently the agency has requested comments on Adaptive Frontal Lighting Systems (AFS), seeking industry responses to questions concerning the design latitude of AFS, including “as a replacement for non-AFS headlighting systems.” 68 *Fed. Reg.* 7101 at 7103 (2003).

4. The Draft Interpretations, if Implemented, Could Raise Significant Intellectual Property Issues for Replacement Lighting Manufacturers

The draft interpretations would require replacement lighting conformance to FMVSS 108 to be “determined by reference to the original equipment being replaced and the vehicle for which [the original equipment] was designed ... in the same manner as the original equipment lamp....”¹⁴ To the extent that an aftermarket lamp could only meet these proposed conditions by conforming to or copying the original part’s “trade dress” (e.g., overall appearance of a product) or patented features, the draft interpretations could have the obviously unintended result of forcing replacement lighting manufacturers to make the unenviable choice of either getting out of the business of producing replacement lighting products or running the risk of infringing the intellectual property rights of a vehicle manufacturer, original equipment manufacturer, or both.

Trade dress is the totality of any elements of a product, including the shape and design of a product itself.¹⁵ It is “the design and appearance of [a] product together with the elements making up the overall image that serves to identify the product presented to the consumer.”¹⁶ It operates in a manner similar to trademarks in that a valid trade dress functions as an indicator of origin or source identifier of a product. Trade dress infringement occurs if the trade dress of a new product is “likely to be confused” with the trade dress of the original product. Trade dress infringement is a violation of the federal Lanham Act (§§32(1) and 43(a)). Damages may include an injunction, an award of plaintiff’s lost sales, defendant’s profits and, in certain circumstances, triple damages.

Thus, if an original equipment lamp has a protectable trade dress consisting of, for example, the shape of a headlamp or reflector, or the placement and appearance of the lamps on the vehicle, a replacement lamp manufacturer who is required to duplicate this trade dress to comply with NHTSA’s interpretive position may be liable for infringement.

¹⁴ 68 *Fed. Reg.* at 42455.

¹⁵ J.T. McCarthy, *McCarthy on Unfair Competition*, §8:1.

¹⁶ See *Fun-Damental Too, Ltd. v. Gemmy Indus.*, 111 F.3d 993, 999 (2d Cir. 1997) (internal citation omitted).

Indeed, automobiles have been protected under the trade dress doctrine by the courts previously.¹⁷

Lamps on vehicles may also be subject to various patents. For example, a manufacturer may own patent rights in shape of the reflector, material of the filament, or the mounting structure of the light into a vehicle body. To the extent that a replacement lamp must duplicate any of these or other patentable features, the manufacturer would be liable for patent infringement. Violation of the patent laws could result in an injunction and onerous financial penalties, including a disgorgement of profits and retroactive royalty payments.

5. TSEI Believes That Rulemaking Is the Only Appropriate Process to Address NHTSA's Concerns: the Institute Proposes Changes in the Draft Interpretations and Two Approaches in Amending FMVSS 108

For the reasons as discussed above, TSEI recommends the following changes in the interpretation letters:

(a) With respect to Draft Interpretation No. 1, TSEI respectfully submits that the response should be that the application in issue is not permissible under FMVSS 108, since the reflex reflectors would not be “as far apart as practicable” as required by the standard.

The agency should revise this interpretation to avoid any implication that the design of the replacement lamp depends on the design of the original lamp.

(b) Draft Interpretation No. 2:

. . . Regarding the question, “May a lamp manufacturer design a replacement lamp to use a different wattage bulb, such as switching from an 1157 to a 2057?” TSEI believes NHTSA’s response must be that this would be allowed

¹⁷ See, e.g., *Ferrari S.p.A. Esercizio Fabriche Automobile Corse v. McBurnie*, 11 U.S.P.Q.2d 1843 (S.D. Cal. 1989) (the overall design on the FERRARI DAYTONA SPYDER held protectable trade dress); *Ferrari S.p.A. Esercizio Fabriche Automobile Corse v. Roberts*, 739 F.Supp. 1138 (E.D. Tenn. 1990),

only if the vehicle complies with Standard 108 after the replacement lamp is installed. The performance-based safety standards place requirements on both the manufacturer and installer (the latter, under 49 U.S.C. §30122, the “anti-tampering” provision of the Safety Act) of replacement equipment. This question does raise two concerns:

1. Installing lamps of higher wattage on a vehicle may cause problems with the vehicle electrical system. It is illegal for an installer of replacement equipment to make a vehicle non-compliant with FMVSS 108 by creating a problem with the vehicle’s electrical system.
2. If, in the future, the replacement lamp needs the bulb replaced, it may be unclear which type of bulb to use. Although the standard does not require all lamps to be marked with replacement bulb type, the manufacturer can reduce the likelihood of this problem by marking the replacement bulb type on the lamp.

... Regarding the question, “May a lamp manufacturer design a replacement lamp to use a different color bulb? Again, NHTSA’s response should be that this would be allowed only if the vehicle complies with Standard 108 after the replacement lamp is installed. This question also raises the concern about proper replacement of bulbs in the future. It should be noted that this concern also exists for original equipment lamps.

... Regarding the question about modified or replacement wiring harnesses, here again, NHTSA’s response should be that this would be allowed only if the vehicle complies with Standard 108 after the replacement equipment is installed.

... Regarding the question about changing the light source from replaceable bulb to sealed LED, NHTSA’s response should be that this would be

aff’d, 944 F.2d 1235, *cert. denied*, 505 U.S. 1219 (1992) (unique exterior design of the Ferrari vehicle is its trade dress or mark).

allowed only if the vehicle complies with Standard 108 after the replacement equipment is installed.

* * *

TSEI further submits that its comments logically point toward two constructive changes in Standard 108. These are:

(1) That lamps be marked to indicate all of their included functions. This would enable installers of replacement equipment to identify which functions are included in original and replacement equipment, and also allow state inspectors to identify which functions are included.

(2) Lamps using replaceable bulbs should be marked with the bulb type designation.

TSEI is also aware of NHTSA concerns with respect to regulation of clear lens tail lamps. These safety concerns should be clarified so that a responsive rulemaking proposal can be developed. Some of the related issues, such as white light reflections, are currently under review by research entities.

Conclusion

TSEI urges NHTSA to reconsider the proposed views outlined in the agency's draft interpretations, and their very adverse implications with respect to vehicle lighting manufacturers of replacement products. The damage to the industry if vehicle manufacturers' lighting designs dictate the direction and future of the replacement market is incalculable. If the agency's proposals are to be pursued further, a rulemaking activity is the only lawful course available. TSEI urges the agency's favorable consideration of its proposed changes in the interpretation letter responses and suggested amendments of Standard 108, the latter of which are intended to assist in achieving NHTSA's objectives in this matter.

* * *

TSEI appreciates this opportunity to offer its comments on the agency's draft interpretations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann M. McCulloch", written over a horizontal line.

Ann McCulloch
Executive Director
Transportation Safety Equipment Institute